In the United States Court of Federal Claims

Case No. 00-737C
(Filed: October 28, 2005)
TO BE PUBLISHED

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DAVID A. SCHOLL,	*	Petition for Mandamus; Interlocutory
	*	Appeal, 28 U.S.C. § 1292(d)(2);
Plaintiff,	*	Timeliness; Motion for Stay; Subject
	*	Matter Jurisdiction; Separation of
v.	*	Powers; Appointments Clause;
	*	Governmental Privilege; *In Camera*
THE UNITED STATES OF AMERICA,	*	Review; Irreparable Harm; Extension
Defendant.	*	of Time.
	*	

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Cletus P. Lyman, Lyman & Ash, Philadelphia, Pennsylvania, attorney of record for Plaintiff.

Todd M. Hughes, Assistant Director, Commercial Litigation Branch, Department of Justice, Washington D.C., attorney of record for Defendant.

Sarah Leigh Martin, law clerk.

ORDER/OPINION

BASKIR, Judge.

On October 21, 2005, the Defendant filed a Motion for a stay of all proceedings in this case in anticipation of its filing some days hence a Petition for a Writ of Mandamus with the U.S. Court of Appeals for the Federal Circuit. In the alternative, the Defendant requested an interim stay to allow the Federal Circuit to consider a potential stay motion with that court. On October 24, the Court issued an Order reminding the parties that they must still adhere to the November 1 deadline for various filings as required by our Order of October 5, 2005.

The Petition for Mandamus was filed in the Court of Appeals on October 26, 2005. A courtesy copy of the Petition arrived in our chambers on Thursday morning, October 27, 2005 (without a copy of the emergency motion for a stay, which the Defendant also filed with the Court of Appeals on October 26). Thus, the Court has had the Petition for barely 24 hours.

The Court is not prepared to rule on the Defendant's Motion for a stay at this time. The Defendant simply did not file its Motion for a stay with enough time to review the promised Petition, and for the Plaintiff to file a response, before the impending November 1 deadline. The Government's tardy filings are habitual in this case. For example, in this Court's Order of March 30, 2005, we denied the Defendant's Motion to certify the case for interlocutory appeal in part because it was grossly untimely, coming, as it did, more than two years after the first of the decisions it sought to appeal.

This Court's Order of April 23, 2003, made it clear that the Defendant must consolidate all of its remaining Rule 12(b) theories in one final motion, rather than continuing to file successive motions to dismiss. Even so, the Defendant now asserts separation of powers and Appointments Clause arguments in support of its attack on this Court's jurisdiction. The new arguments, suggested for the first time in an August 25, 2005, opposition to Plaintiff's Motion to Compel, come more than two years after the Court forbade piecemeal challenges.

While the Court is not prepared to rule on the Motion for a stay at this time, we have serious doubts about the merits of the Defendant's Petition. As the Defendant acknowledges in its Petition, mandamus is an extraordinary writ that is appropriate only when there is no other adequate means to obtain relief. *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402-03 (1976). Not so in this case. The Court previously invited the Defendant to move for certification for interlocutory appeal of a discovery production ruling in the event such a ruling is made. *See* Order of October 5, 2005. This Court has not yet made a discovery production ruling that would require the Defendant to turn over unprotected any allegedly privileged documents to the Plaintiff.

The Petition argues that the mere delivery of the allegedly privileged documents to the Court for *in camera* review would cause irreparable harm to the Defendant. *In camera* review is not a public disclosure of documents. Quite the contrary, it is a "highly appropriate and useful means of dealing with claims of governmental privilege." *Kerr*, 426 U.S. at 406. Even the President is subject to have his allegedly privileged documents reviewed *in camera* by a court of law. *See Nixon v. United States*, 418 U.S. 683, 706 (1974) ("Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.").

Other arguments in Defendant's Petition are unconvincing. Defendant's claims of irreparable harm resulting from the Court's very exercise of jurisdiction in this case are especially curious, considering it waited almost five years of litigating the case before raising the separation of powers/Appointments Clause argument.

The Petition is misleading in its claims that certain documents requested during discovery fall under the deliberative-process privilege. While it is possible that the privilege could apply to certain documents, the Defendant has not claimed such a privilege to this Court. Both its brief in opposition to the Plaintiff's Motion to Compel and

its privilege log are notably silent with respect to the deliberative-process privilege.

The Court would like to reiterate its ruling of October 5. In that Order, the Defendant was ordered to produce an amended privilege log containing the legally required information. In addition, the Defendant was ordered to produce all of the allegedly privileged documents listed in its privilege log for *in camera* review, and was directed to respond to Plaintiff's Interrogatory 1, which asked the Defendant to identify its expected witnesses at trial.

The Plaintiff was also ordered to show cause why Count 1 of his Complaint, alleging procedural due process errors in the decision-making process, should not be dismissed for lack of subject matter jurisdiction. If Count 1 is dismissed, it is possible that some, and conceivably all, of the documents listed in the privilege log will cease to be relevant to Plaintiff's claim.

The Court has reluctantly decided to grant the Defendant an extension of time. Our refusal to grant at this time the more extensive relief the Defendant requests in its Motion for a stay should allow the Defendant to seek whatever relief it chooses before the Court of Appeals. *See* Fed. R. App. P. 8(a)(2)(A)(ii).

For the convenience of all interested persons, the Court's Orders of April 23, 2003; March 30, 2005; and October 5, 2005, will be attached to this Order.

The Court hereby grants a 60-day extension of time for the parties to comply with the Court's October 5, 2005, Order. The required documents must be filed no later than January 2, 2006.

IT IS SO ORDERED.

/s/ Lawrence M. Baskir
LAWRENCE M. BASKIR
Judge

Attachments

In the United States Court of Federal Claims

Case No. 00-737C
(Filed: October 5, 2005)

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DAVID A. SCHOLL, *
Plaintiff, *
*
v. *
*
THE UNITED STATES OF AMERICA, *
Defendant. *
*

****

ORDER

On July 12, 2005, the Plaintiff filed his Motion to compel the Defendant's answer to Interrogatory 1 (First Motion); and his Motion to impose evidentiary consequences on the Defendant, overrule the Defendant's objections to discovery, and compel answers to interrogatories (Second Motion). The Defendant filed its Combined Opposition to Plaintiff's discovery motions on August 25, 2005, which included a Renewed Motion for Certification of an Interlocutory Appeal. Plaintiff filed his Reply on September 19.

In their Joint Status Report (JSR), filed by the parties on August 19, 2005, the Plaintiff expressed his desire to proceed to trial once this discovery dispute has been resolved. The Defendant once again raised its argument that this case should be certified for interlocutory appeal.

I. Interlocutory Appeal

The last seven pages of Defendant's brief are dedicated to its Motion that this case be certified for interlocutory appeal, which this Court clearly rejected in its opinion of March 30, 2005.

In its Order of March 30, 2005, this Court denied the Defendant's Motion to Certify Interlocutory Appeal as to the issues of law presented in this Court's opinions in *Scholl v. United States*, 54 Fed. Cl. 640 (2002) (*Scholl I*), and *Scholl v. United States*, 61 Fed. Cl. 322 (2004) (*Scholl II*). The Order rejected Defendant's motion as untimely, and because it failed to satisfy the requirements for interlocutory appeal. A motion

requesting an interlocutory appeal as respects a discovery ruling on privilege was, as a minimum, not then ripe. Of course, either party is free to seek an interlocutory appeal as respects a discovery ruling once one is made.

The parties should also note that the Defendant's Motion violates the Court's Special Procedures Order, which has been amended since it was issued to the parties on September 11, 2000. Paragraph 8 of the Special Procedures Order, which was revised June 1, 2005 and has been filed concurrently with this Order, prohibits parties from making Motions in the text of legal memoranda.

The Defendant's Renewed Motion for Certification of an Interlocutory Appeal as to *Scholl I* and *Scholl II*, pages 13 to 19 of its Brief, is denied for reasons previously stated.

II. *In Camera* Review

In his Motions to compel discovery, the Plaintiff challenges the sufficiency of the Defendant's privilege log, and also requests that the Defendant be required to submit allegedly privileged documents for the Court's *in camera* review. **The Plaintiff's request is granted**. The privilege log does not contain sufficient information about the documents to allow the Court to come to a reasoned decision.

By Defendant's own admission, a privilege log should identify all withheld documents and "describ[e] their general subject matter." Def. Brief at 5. However, Defendant's privilege log does not identify the general subject matter of many of the documents. **The Defendant is hereby ordered to re-submit its privilege log no later than November 1, 2005, identifying the general subject matter of documents 3-4, 6-7, 11-12, 14, 28-29, 31, 45-47, 49-50, and 52, based on the numbering system used in the Appendix to Plaintiff's Second Motion.**

The Defendant is also ordered to submit to the Court, under seal, all of the documents in its privilege log no later than November 1, 2005. The Defendant shall number each document in accordance with the numbering system used by the Plaintiff in the Appendix to its Second Motion. The Plaintiff's Motion to overrule Defendant's claims of privilege is stayed until the Court can review the requested documents.

III. Protective Order

The Court is hereby issuing a Provisional Protective Order in the event it becomes advisable to protect the confidentiality of evidence in this case. The parties are directed to submit any proposed changes in the Order no later than October 15, 2005 after which time the Order will become final.

IV. Interrogatory 1: The Witness Lists

In his Motion to compel Interrogatory 1, the Plaintiff seeks the name and nature of the testimony of each witness the Defendant intends to call at trial. In response, the Defendant claims: 1) the Rules do not require such a disclosure this far in advance of trial; 2) the decision-making process of the Third Circuit judges, the likely witnesses, is privileged; and 3) the Defendant is unable to identify trial witnesses without first knowing how the Plaintiff intends to prosecute his case. We address these arguments in turn.

First, regardless of the eventual trial date, the Court may order the Defendant to disclose its witness list. *See* RCFC 26(b)(1) ("For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."). To the extent that the Court's prior orders setting forth the discovery schedule are not clear, the Court now holds that Interrogatory 1, seeking the name and nature of testimony of all witnesses the Defendant intends to call at trial, is timely.

Second, the Defendant attempts to assert a privilege to protect the list of witnesses it intends to call at trial. It defies logic and well-established legal principles, however, to allow the Defendant to claim a privilege that it later intends to waive by calling the very witnesses it seeks to protect.

Third, Defendant's argument that it cannot produce its witness list because of a lack of understanding of the nature of the Plaintiff's case is also without merit. The Plaintiff's Complaint clearly identifies two Counts – Count 1 alleges violations of the Due Process Clause of the Fifth Amendment, and Count 2 alleges violations of the Regulations governing reappointment of Bankruptcy judges. Throughout this litigation, the Plaintiff has made evident his theories with respect to these two counts.

Plaintiff's Motion to compel an answer to Interrogatory 1 is hereby granted as to Count 2. The Defendant is ordered to produce the name and nature of testimony of each witness it intends to call at trial in defending against Count 2. The Plaintiff is also directed to produce its list of witnesses as to Count 2 if not previously disclosed. The Plaintiff's Motion with respect to Count 1 is stayed pending the results of the Show Cause Order in the next section of this document.

V. Count 1 of the Complaint

To date, the Defendant has not moved to dismiss Count 1 of the Complaint for lack of jurisdiction. Of course, the issue may not be waived, and the Court may consider whether it has subject matter jurisdiction over a claim *sua sponte*. *E.g., Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005). If the statute, regulation, or Constitutional provision on which the claim is based is not money-mandating, then the Court must find that it lacks jurisdiction to hear the claim. *Id.* Because the Due Process

Clause of the Fifth Amendment is not a money-mandating provision of the Constitution, *see Mullenburg v. United States*, 857 F.2d 770, 773 (Fed. Cir. 1988), the Court likely lacks jurisdiction to hear Count 1 of the Plaintiff's Complaint.

The Plaintiff is therefore ordered to show cause no later than November 1, 2005 why Count 1 of his Complaint, based on the Due Process Clause of the Fifth Amendment, should not be dismissed for lack of subject matter jurisdiction. The Defendant may respond no later than November 30, and the Plaintiff's Reply is due December 14.

IT IS SO ORDERED.

/s/ Lawrence M. Baskir
LAWRENCE M. BASKIR
Judge

In the United States Court of Federal Claims

Case No. 00-737C
(Filed: April 23, 2003)

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DAVID A. SCHOLL, *
Plaintiff, *
*
v. *
*
THE UNITED STATES OF AMERICA, *
Defendant. *
*

****

ORDER

This Order confirms the agreement reached by the parties in the Status Conference that the Court held in this matter on April 23, 2003.

I. Defendant's Motion to Dismiss

The Defendant filed its first Motion to Dismiss in December 2000, which the Court denied in a December 2002 Opinion. On March 31, 2003, the Defendant filed another Rule 12(b) Motion to Dismiss for Lack of Jurisdiction, raising a new issue with the Plaintiff's Complaint. Because the Court requires the Defendant to raise all remaining Rule 12(b) defenses in one motion, **the Defendant's March 31st motion is hereby STRICKEN from the Record.**

The Defendant is permitted to file another Rule 12(b) Motion, but it must be the Defendant's final such motion and shall so state. **The Defendant's Renewed Motion to Dismiss shall be filed no later than May 26, 2003. The Plaintiff shall respond by June 27, 2003, and the Defendant's reply is due on July 11, 2003.**

II. Discovery

As discussed, the Court will not permit discovery to proceed in this case until after ruling on the Defendant's Renewed Motion to Dismiss. **The Plaintiff shall withdraw its discovery request at this time.** The parties may, of course, conduct informal document exchange. **Accordingly, the Defendant's April 17, 2003, Motion for Leave to File a Motion for Enlargement of Time in which to Respond to the Plaintiff's Discovery Request is DENIED as Moot**, as is the Defendant's underlying request for extension of time.

The parties shall filed a Joint Status Report thirty (30) days after the Court rules on the Defendant's motion. The JSR shall contain a detailed discovery plan in accordance with the requirements indicated at this status conference.

IT IS SO ORDERED.

/s/ Lawrence M. Baskir
LAWRENCE M. BASKIR
Judge

In the United States Court of Federal Claims

Case No. 00-737C
(Filed: March 30, 2005)
TO BE PUBLISHED

DAVID A. SCHOLL, *Plaintiff*,	*	Interlocutory Appeal, 28 U.S.C. § 1292(d)(2); Timeliness.
v.	*	
THE UNITED STATES OF AMERICA, *Defendant.*	*	

Cletus P. Lyman, Lyman & Ash, Philadelphia, Pennsylvania, attorney of record. With him on the briefs was ***Michael S. Fettner***.

Todd M. Hughes, Assistant Director, Commercial Litigation Branch, Department of Justice, Washington D.C., attorney of record. With him on the briefs were ***David M. Cohen***, Director, and ***Robert D. McCallum, Jr.***, Assistant Attorney General.

Tahmineh I. Maloney, law clerk.

ORDER/OPINION

BASKIR, Judge.

On December 4, 2002, this Court denied the Defendant's motion to dismiss for failure to state a claim upon which relief may be granted. *See Scholl v. United States*, 54 Fed. Cl. 640 (2002) (*Scholl I*). We held that "Judge Scholl had a firm right - absent other factors which we will explore in further proceedings - to be reappointed as a U.S. Bankruptcy Judge for the Eastern District of Pennsylvania." *Id.* at 640-41. Defendant's counsel filed a motion for reconsideration three months later, on February 28, 2003. We denied the motion on March 24, 2003.

On May 27, 2003, Defendant's counsel filed a "renewed" motion to dismiss for lack of subject matter jurisdiction. In our opinion of June 23, 2004, we denied the Government's renewed motion. *See Scholl v. United States*, 61 Fed. Cl. 322 (2004) (*Scholl II*). In so doing, we found that Defendant's counsel had not

established that the enactment of the Civil Service Reform Act of 1978 (CSRA), Pub. L. 95-454, 92 Stat. 1111, foreclosed judicial review of Judge Scholl's claims. *Id.* at 322. We based our holding upon an examination of both the CSRA and the Bankruptcy Reform Act of 1978.

On October 20, 2004, almost two years after *Scholl I* and four months after the ruling in *Scholl II*, Defendant's counsel filed a Motion to Certify Interlocutory Appeal and to Stay Further Proceedings. The Plaintiff has opposed the motion. In his motion, Defendant's counsel asks that the Court amend both *Scholl I* and *Scholl II* to include the express findings required by 28 U.S.C. § 1292(d)(2) and to certify the orders for interlocutory appeal. He also requests that the Court stay all further proceedings pending final resolution of the interlocutory appeal. We denied the stay request in our order dated January 10, 2005.

Because we find that the Defendant's request is untimely with respect to both *Scholl I* and *Scholl II* and because the Defendant fails to satisfy other requirements for an interlocutory appeal, we hereby deny the Defendant's Motion to Certify Interlocutory Appeal.

Discussion

I. Timeliness

At the time we entered our opinions in *Scholl I* and *Scholl II*, neither was certified for interlocutory appeal under 28 U.S.C. § 1292(d)(2), nor did counsel request such certification in his dispositive briefing or afterwards. Counsel now asks that we amend our opinions of December 17, 2002, *Scholl I*, and June 23, 2004, *Scholl II*, adding a section 1292(d) certification. 28 U.S.C. § 1292(d)(2), states, in relevant part:

> when any judge of the [United States Court of Federal Claims], in issuing an interlocutory order, *includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation*, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

28 U.S.C. § 1292(d)(2) (emphasis added). The language of 28 U.S.C. § 1292(d)(2) is virtually identical to 28 U.S.C. § 1292(b), which governs interlocutory appeals in the United States District Courts. *See United States v.*

Connolly, 716 F.2d 882, 885 (Fed. Cir. 1983). We may therefore look to the legislative history and case law of Section 1292(b).

The Plaintiff challenges the motion as untimely with respect to both of the Court's opinions. The statute governing interlocutory appeals does not set an explicit time limit within which a party must file a motion to certify. *See* 28 U.S.C. § 1292(d)(2). However, it does refer to an "immediate appeal" and it mandates that an application to appeal - following a trial court's order that includes the trial judge's certification - must be filed in the circuit court within ten days after the entry of the order.

The statutory expectation that the appeal process will be implemented with dispatch should not be circumvented without reason. Accordingly, granting a motion to amend beyond the ten-day limitation period is only proper where there is a reason for the delay. *See, e.g., Weir v. Propst*, 915 F.2d 283, 287 (7th Cir. 1990); *Ferraro v. Sec. of HHS*, 780 F.Supp. 978, 979 (E.D.N.Y. 1992). Unreasonable delay constitutes sufficient cause to deny a motion and a judge "should not grant an inexcusably dilatory request." *Richardson Elecs., Ltd. v. Panache Broad of Pa., Inc.*, 202 F.3d 957, 958 (7th Cir. 2000).

Defendant's counsel defends his motion as timely, citing the lengthy internal review process within the Department of Justice before the Acting Solicitor General authorized the motion. Def.'s Reply at 4. Apparently, scheduled vacations or "annual leave schedules" also interfered with counsel's ability to bring a prompt motion before the Court. *Id.* at fn.1. Defendant's counsel does not state at what pont he determined to seek an appeal and he provides no time-line of events.

The Court is thus unable to determine to what extent the delay was actually due to the approval process, how much was attributable to time off for vacation, and how much can be attributed to counsel's inaction. Defendant's counsel cites no cases to support the proposition that the United States should be treated differently from private parties in determinations of timeliness. At no point did counsel advise the Court that he had initiated the review process, much less did counsel seek leave of this Court to stay proceedings pending the completion of the Department of Justice's internal processes. Accordingly, we do not accept counsel's attempts to excuse his procrastination.

The Plaintiff cites numerous cases in which other courts have denied motions to certify where the motions were made from one month to five months after entry of the order sought to be appealed. *See, e.g., Morton College Bd. of Trustees v. Town of Cicero*, 25 F. Supp. 2d 882, 885 (N.D.Ill. 1989) (one month); *Fabricant v. Sears Roebuck & Co.*, 2001 U.S. Dist. Lexis 24518 (S.D. Fla.) (forty-six days); *Weir*, 915 F.2d at 283 (sixty-three days); *Ferraro*, 780 F.Supp. at 979

(two and a half months); *In re Buspirone Patent Litigation*, 210 F.R.D. 43, 50 (S.D.N.Y. 2002) (three months). In response, Defendant's counsel cites to three cases in this court where motions to certify were allowed several months after the issuance of a decision. *See Marriott Int'l Resorts v. United States*, 63 Fed. Cl. 144 (2004) (three months); *American Mgmt. Sys. v. United States*, 57 Fed. Cl. 275, 275-76 (2003) (two months); *Vereda, LTDA v. United States*, 46 Fed. Cl. 569, 569-70 (2000) (three months). Counsel's four month delay exceeds the time period in his cited cases.

In *Marriott International*, the defendant filed a motion to reconsider or stay the decision. The court denied the motion to reconsider but granted the motion to stay "'such that the government [might] make an orderly and considered decision whether or file an interlocutory appeal or seek a writ of mandamus regarding this court's opinion and order.'" 63 Fed. Cl. 145, quoting August Order at 2. *American Management* and *Vereda, LTDA* did not address the timeliness question. Based on the precedent provided by the Defendant, four months is too long absent a prior request for stay. With respect to *Scholl II,* the motion is untimely.

The question is not even close with respect to *Scholl I.* The Defendant's argument for timeliness lies buried in a footnote:

> It would have been premature for the Government to seek interlocutory review of the 2002 order when the case still could have been terminated by this Court based upon our renewed motion to dismiss....It would be vastly inefficient for the Court to certify only its later ruling, and not its former, when a reversal of either would terminate the litigation.

Def.'s Reply at n.2.

Defendant's counsel is unable to cite a single case where a motion for interlocutory appeal was allowed after such a long delay or upon such flimsy grounds. Counsel's delay in seeking an interlocutory appeal from our opinions suggests that prompt resolution of this litigation is not on his agenda. Defendant's counsel chose to file his two motions seriatim, the second six months after the first was decided. It was thus even more incumbent upon him to seek the Court's leave for any delay of his motion to certify an interlocutory appeal. We deny the Defendant's motion to certify *Scholl I* as untimely.

II. Standards for Certification

Whether to grant or deny a motion for certification of an interlocutory appeal lies largely in the discretion of the trial judge. *See D'Ippolito v. Cities Service Co.*, 374 F.2d 643, 649 (2d Cir. 1967); *Arthur Young & Co. v.*

United States Dist. Court, 549 F.2d 686, 698 (9th Cir. 1977). Section 1292(d)(2), quoted earlier, sets forth three substantive standards before the court certifies an interlocutory appeal. An issue of controlling law exists about which there is "substantial" difference of opinion, and the appeal will "materially advance the ultimate termination of the litigation." The Report of the Committee on Appeals from Interlocutory Orders of the District Courts elaborates on these factors:

> Your Committee is of the view that the appeal from interlocutory orders thus provided should and will be used only in exceptional cases where a decision of the appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases, where a question which would be dispositive of the litigation is raised and there is serious doubt as to how it should be decided,....It is not thought that district judges would grant the certificate in ordinary litigation which could otherwise be promptly disposed of or that mere question as to the correctness of the ruling would prompt the granting of the certificate.

Northrop Corp., Northrop Elec. Sys. Div. v. United States, 27 Fed. Cl. 795, 798 (1993), citing Report of the Committee on Appeals from Interlocutory Orders of the District Courts, Sept. 23, 1953, reprinted in 1958 U.S.C.C.A.N., 85th Cong. 2d Sess., at 5260-61.

Interlocutory review should be reserved for "exceptional" cases: "Routine resort to § 1292(b) requests would hardly comport with Congress' design to reserve interlocutory review for 'exceptional' cases while generally retaining for the federal courts a firm final judgment rule." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996) (citing *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 475 (1978), in turn quoting *Fisons, Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir. 1972)). The legislative history, as well as the historic policy against such appeals, indicates that great restraint should be used in granting such appeals. *See, e.g., Aleman Food Services, Inc. v. United States*, 24 Cl. Ct. 345, 357 (1991).

"Controlling Question of Law"

The first criterion of Section 1292(d)(2) requires a "controlling question of law." The Defendant maintains that the jurisdictional issues addressed by *Scholl II* are "controlling issues of law" because reversal of that opinion would terminate the proceedings. Def.'s Motion at 4. Counsel's argument cuts too deeply. Successful appeals of denials of the Government's motions to dismiss under 12(b)(1) or (6) *always* result in termination of all or at least that part of Plaintiff's case. Something more is needed to justify an interlocutory appeal of unsuccessful motions to dismiss.

What might set these dispositive motions apart is the controversial nature of the discovery their denials might suggest. Counsel made much of that in his papers. But these fears are imaginary. As we set out in our order of January 10, 2005, Plaintiff's counsel had not previously sought such discovery, and later he completely disavowed any intention of doing so. Perhaps the appropriate juncture to seek an interlocutory appeal would be after a court order requiring such disclosures.

The more accurate test of whether *Scholl I* or *II* presents a "controlling question of law" has been put forth by the Court of Claims: "[q]uestions of law have only been deemed 'controlling,' under this statute, if they materially affect issues *remaining to be decided in the trial court*." *See, e.g., Brown v. United States*, 3 Cl. Ct. 409, 411 (1983) (internal citations omitted); *Coast Federal Bank, FSB v. United States*, 49 Fed. Cl. 11 (2001); *Marriott Int'l Resorts*, 63 Fed. Cl. 144. Under this standard, *Scholl I* and *II* likely present controlling questions of law.

"Substantial Ground for Difference of Opinion"

The second criterion of Section 1292(d)(2) requires a "substantial ground for difference of opinion." Defendant's counsel has failed to show that a "substantial" ground for difference exists, as respects either *Scholl I* or *Scholl II.* The opinions he cites by the Ninth and Eleventh Circuit concern the preclusive effect the enactment of the CSRA had upon *Bivens* actions. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court held that a plaintiff could state a cause of action against a federal officer for constitutional violations occurring under the color of federal law. 403 U.S. 388 (1971). As we stated in our decision, *Scholl II* involves totally different considerations from *Bivens* actions.

The Defendant cites opinions by our sister circuits for the proposition that the Civil Service Reform Act (CSRA), as interpreted by the Supreme Court in *United States v. Fausto*, 484 U.S. 439, 443 (1998), precludes challenges to adverse personnel decisions by judicial branch employees. *See Lee v. Hughes*, 145 F.3d 1272, 1274-1275 (11th Cir. 1998) (probation officer); *Blankenship v. McDonald*, 176 F.3d 1192, 1195 (9th Cir. 1999) (court reporter). Neither decision involved a bankruptcy judge. And consequently, neither court addressed our view that the Bankruptcy Reform Act of 1978, "a statutory scheme separate from the CSRA governs the appointment, reappointment, and removal of bankruptcy judges." *Scholl II*, 61 Fed. Cl. at 325. Instead, each cited decision addressed the availability of a *Bivens* action to a federal employee that was not afforded administrative or judicial remedies under the CSRA. The decisions by the Ninth and Eleventh Circuits offer authority on the question of whether the CSRA

precludes the availability of other actions, including *Bivens* actions, for those employees under its purview, but those employees do not include bankruptcy judges.

As for *Scholl I*, our decision construed the language of a provision to determine whether the provision was mandatory. Not only was this exercise fairly unremarkable, but counsel's contribution was decidedly unhelpful.

Conclusion

The Defendant has failed to meet its burden of demonstrating that interlocutory appeal is warranted. Accordingly, its motion is denied.

IT IS SO ORDERED.

/s/ Lawrence M. Baskir
LAWRENCE M. BASKIR
Judge